Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

CHARLES LePRINCE,

Petitioner,

vs.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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301-P

QUESTION PRESENTED

Whether the partial forfeiture of the petitioner's fully vested pension subjected the petitioner to multiple punishment in violation of the Double Jeopardy Clause when the forfeiture was based solely upon the petitioner's previous plea of guilty in a criminal matter for which he had been sentenced.

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Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Charles LePrince, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey denying petitioner's petition for certification and motion for rehearing of that denial in which review was sought of the judgment of the Superior Court of New Jersey, Appellate Division filed on March 19, 1993.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division is reported at 267 N.J. Super. 270, 631 A.2d 545 and appears in the appendix hereto at la to 10a. The decisions of the Supreme Court of New Jersey are unreported.

STATEMENT OF JURISDICTION

This petition for writ of certiorari is being filed within ninety days of the decision of the Supreme Court of New Jersey of November 4, 1993 denying reconsideration (11a) of its previous order of September 10, 1993 (12a) denying review by certification. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment V:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

On January 1, 1986, petitioner Charles LePrince retired from his position as a psychologist in the Clifton public school system due to failing health. At the time, petitioner was sixty-one years old and had worked in the school system for more than twenty-two years. During those years, his professional work had consistently been reviewed favorably by his supervisors. At the time of his retirement, petitioner had a fully vested pension in the amount of $1,465.08 per month.

On October 13, 1987, more than twenty-one months after his retirement, a complaint was issued charging petitioner with acts of

criminal sexual contact against a former student. He was subsequently indicted and, on December 20, 1989, entered a plea of guilty to one count of aggravated criminal sexual contact consisting of one act of touching the thigh of a student on an undetermined date between December 31, 1981 and June 30, 1982.

A psychiatric evaluation, which is mandated by New Jersey law prior to sentencing for such offenders, determined that the petitioner's conduct was the result of a compulsive sexual disorder. On March 20, 1990, petitioner was sentenced to a three year term of probation and required to receive appropriate counseling. No fine was imposed. The sentencing took place one month before the petitioner's sixty-sixth birthday.

On August 2, 1990, the Board of Trustees of the Teachers' Pension and Annuity Fund (T.P.A.F.) determined that the petitioner's last creditable day of service was December 31, 1981. Accordingly, his monthly pension was reduced by fifty-five percent, from $1,465.08 to $655.02. T.P.A.F. also determined that petitioner owed $46,287.96 due to overpayments made between the date of his retirement and the effective date of the reduction of his pension. Accordingly, his pension was further reduced to $385 a month, a seventy-four percent reduction from the original amount. T.P.A.F.'s determination and actions were based solely upon the petitioner's plea of guilty.

An appeal from the T.P.A.F. determination was taken to the Office of Administrative Law. The Administrative Law Judge's initial determination of December 10, 1991, affirming the T.P.A.F. action was subsequently adopted by the T.P.A.F. on January 10, 1992. On appeal, the Superior Court of New Jersey, Appellate Division affirmed the T.P.A.F. decision reducing the petitioner's pension but remanded the matter to the T.P.A.F. for reconsideration of its decision regarding the repayment claimed to be due from the petitioner.

The petitioner sought certification to the Supreme Court of New Jersey. On September 10, 1993, the court granted the motions of the New Jersey Education Association (13a) and the Association of Criminal Defense Lawyers of New Jersey (14a) for leave to appear in the matter as *amicus curiae* but denied the petition for certification. A motion for reconsideration was denied on November 4, 1993.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW FAILED TO FOLLOW THE PRECEDENTS OF THIS COURT AND PERMITTED THE PARTIAL FORFEITURE OF THE PETITIONER'S VESTED PENSION THUS VIOLATING HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

In *United States v. Halper,* 490 U.S. 435, 109 S. Ct. 1892 (1989), this Court discussed the relationship between the Double Jeopardy Clause of the United States Constitution and civil penalties. Justice Blackmun explained that the clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after a conviction, and multiple punishments for the same offense." 490 U.S. at 440, 109 S. Ct. at 1897. This case concerns the third abuse — multiple punishment. *Halper* addressed "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." 490 U.S. at 446, 109 S. Ct. at 1901. Justice Blackmun explained that a multiple punishment "violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." 490 U.S. at 447, 109 S. Ct. at 1901.

Justice Blackmun stated,

> It is commonly understood that civil

> proceedings may advance punitive as well as remedial goals. . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

490 U.S. at 447-448, 109 S. Ct. at 1901-1902.

A similar analysis was utilized by Justice Blackmun more recently in *Austin v. United States*, 113 S. Ct. 2801 (1993). There, the Court made clear that if a civil forfeiture is, even in part, intended to punish, it is "punishment" for Eighth Amendment purposes.

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or

> deterrent purposes, is punishment, as we have come to understand the term." 113 S. Ct. at 2806. See also 113 S. Ct. at 2812 where the same language is repeated.

The analysis of the nature of "punishment" was acknowledged by the Supreme Court of New Jersey. In *Merin v. Maglaki*, 126 N.J. 430, 599 A.2d 1256 (1992), the Court discussed the "double punishment" analysis of *Halper* and noted, "the central issue in a double-jeopardy challenge of this nature is whether the penalties imposed amount to a 'punishment', thereby triggering constitutional protection, or are only 'remedial' in nature and outside the scope of the Double Jeopardy Clause." 126 N.J. at 442, 599 A.2d at 1262. The fact that pension forfeiture under New Jersey law is intended as punishment is unmistakable. In *Corvelli v. Board of Trustees*, 130 N.J. 539, 617 A.2d 1189 (1992), Justice Clifford, writing for a unanimous Court, repeated language from *Uricoli v. Police & Fire Retirem. Sys.*, 91 N.J. 62, 449 A.2d 1267 (1982), that "pension forfeiture operates as a 'penalty or punishment for wrongful conduct' ". 130 N.J. at 550, 617 A.2d 1195. Indeed, the Supreme Court of New Jersey has termed forfeiture of an "earned pension" a "drastic penalty". *Steinmann v. State Dept. of Treasury*, 116 N.J. 564, 573, 562 A.2d 791, 795 (1989).

In *Halper*, this Court explained that the "twin aims" of punishment are retribution and deterrence. In *Eyers v. Public Employees, Retirem. Sys.*, 91 N.J. 51, 449 A.2d 1261 (1982) the Supreme Court of New Jersey noted that "pension forfeiture policy is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual and deterrence both as to the offending individual and deterrence both as to the offending individual and other employees." 91 N.J. at 56, 449 A.2d at 1264. Such goals "are not legitimate non-punitive governmental objectives", *United States v. Halper*, 490 U.S. at

448, 109 S. Ct. 1902 quoting *Bell v. Wolfish*, 441 U.S. 520, 539, n.20, 99 S. Ct. 1861, 1874, n.20 (1979).

The Superior Court, Appellate Division acknowledged that pension forfeiture has been consistently referred to as "punishment" in the decisions of the Supreme Court of New Jersey. However, it held that the "punishment" referred to in that Court's decisions "is not punishment in the criminal sense, but rather is a collateral consequence of the employee's breach of the condition of honorable service. The 'punishment' is analogous to a judgment for damages arising out of a breach of contract." *LePrince v. Teachers' Pension Fund*, 267 N.J. Super. at 277, 631 A.2d at 549. This analysis is at odds with both double jeopardy law as enunciated by this Court and the description of "punishment" contained in the pension forfeiture cases of the Supreme Court of New Jersey.

There is no claim in this case that the government suffered a loss and thus no claim that the government must be compensated.[1] To the contrary, during the period of "dishonorable service" petitioner continued to receive outstanding evaluations of his work. Nor is there any relationship between the pension forfeiture and any administrative costs. The T.P.A.F. conducted no independent investigation and conducted no hearing. Rather it relied exclusively upon the criminal conviction.

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1. In *Kvitka v. Bd. of Registration in Medicine*, 551 N.E. 2d 915 (Mass. 1990) the Supreme Court of Massachusetts found a double jeopardy violation when, after a physician pled guilty to unlawfully dispensing drugs and was sentenced, a State board revoked his license and ordered him to pay a fine of $10,000. In holding that the fine violated the double jeopardy clause, the court found that, like the pension forfeiture in this case, the purpose of the fine "was to punish the physician and to deter future wrongdoing." Also like this case, *Kvitka* was "not a case where the government itself has suffered a loss because of the [offender's conduct]" 551 N.E. 2d. at 918.

There are "humane interests" behind the Double Jeopardy Clause's proscription of multiple punishments. 490 U.S. at 447, 109 S. Ct. at 1901. One of those interests was explained by Justice Blackmun,

> "[W]hen the government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States v. Halper, supra*, 490 U.S. at 451 n.10, 109 S. Ct. at 1903 n.10.

Such a motivation cannot be discounted in this case where the petitioner was placed on probation and given no fine. In this case, a retiree who is dependent upon his pension is being driven into poverty by a second punishment.

More than a decade has past since the double jeopardy clause was called the "least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights." *Whalen v. United States*, 445 U.S. 684, 699, 100 S. Ct. 1432, 1442 (1980) (Rehnquist, J., dissenting). *Halper*, has added yet another dimension to the analysis. As one court explained,

> In *Halper's* wake, the courts now are being called upon to scrutinize . . . civil penalties for conduct also the subject of criminal statutes to determine under the *Halper* standard whether such fines be penal or remedial in nature.

United States v. Sanchez-Escareno, 950 F.2d 193, 199 (5th Cir. 1991).

One commentator observed, "*Halper* may, in the end, require courts to consider the multiple punishment doctrine whenever civil sanctions are used as a deterrent." *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper,* 76 Va. L. Rev. 1251, 1268 (1990).

The Court has never addressed punishments other than monetary fines in the context of a double jeopardy analysis. The logic of *Halper* would appear to extend the prohibitions of the double jeopardy clause to such situations. The previously referenced commentator noted with respect to *Halper,*

> A literal reading of the Court's theory on what constitutes punishment suggests that any civil sanction that is not exclusively remedial will implicate the double jeopardy clause's multiple punishment protection. This inference seems almost inescapable in view of the Court's conclusions that retribution and deterrence are not legitimate nonpunitive governmental objectives and that a sanction which cannot be characterized as serving only a remedial purpose, but which also serves retributive or deterrent purposes, is punishment. Civil Sanctions and the Double Jeopardy Clause, *supra,* 76 Va. L. Rev. at 1267.

Courts called upon to apply *Halper* might be expected to be resistant to these implications. It is respectfully submitted that this Court should remove any ambiguity existing in *Halper* and provide further guidance as to its meaning.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

HERBERT I. WALDMAN
Attorney for Petitioner

APPENDIX A — OPINION OF SUPERIOR COURT, APPELLATE DIVISION FILED MARCH 19, 1993

RECORD IMPOUNDED
NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3092-91T5

CHARLES LEPRINCE,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION and ANNUITY FUND,

Respondent-Respondent.

Argued January 4, 1993 - Decided MAR 19 1993 Before Judges Petrella, D'Annunzio and Keefe.

On appeal from Final Determination of the Board of Trustees, Teachers' Pension and Annuity Fund. Herbert I. Waldman argued the cause for appellant.

David P. Levine, Deputy Attorney General, argued the cause for respondent (Robert J. Del Tufo, Attorney General, attorney).

Appendix A

The opinion of the court was delivered by

D'ANNUNZIO, J.A.D.

Charles LePrince appeals from a final determination by the Board of Trustees, Teachers' Pension and Annuity Fund (hereinafter Board) effecting a partial forfeiture of his pension.

Appellant retired on January 1, 1986 with twenty-two years and nine months of service as a school psychologist employed by a board of education. His monthly pension was $1,465.08. LePrince was indicted on February 23, 1988. The indictment charged him with one count of aggravated criminal sexual contact, one count of criminal sexual contact, three counts of misconduct in office, and two counts of sexual assault. The acts charged involved three male victims.

Pursuant to a plea agreement LePrince pleaded guilty on December 20, 1989 to the first count which charged that between January 1, 1982 and June 30, 1982 he committed an act of sexual contact with B.C.[1] when B.C. "was at least 13 but less than 16 years old and Charles Edward LePrince had supervisory power over [B.C.]" in violation of *N.J.S.A.* 2C:14-3a and *N.J.S.A.* 2C:142a(2)(b). Defendant was sentenced on March 2, 1990, to three years of probation. The other six counts were dismissed.

It was undisputed that LePrince first met B.C. in his capacity as a school psychologist when he performed an evaluation of B.C. and prepared an evaluation report.

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1. We are using fictitious initials.

Appendix A

In August 1990, the Board notified appellant that due to the offense, it had determined that his service after December 31, 1981 was "not creditable for retirement calculation purposes inasmuch as it was rendered after the date of the offense." The Board recalculated LePrince's monthly pension allowance and reduced it from $1,465.08 to $655.02. It also determined that, because of the reduction in the monthly allowance, LePrince had been overpaid for the period January 1, 1986 to September 1, 1990 in the amount of $46,287.96. The Board demanded repayment of this amount.

LePrince appealed and the matter was heard by an Administrative Law Judge whose initial decision "affirmed" the Board's action. In its Final Administrative Determination dated January 10, 1992, the Board adopted the ALJ's findings and conclusions. LePrince now appeals and makes the following contentions:

I. FULL PENSION BENEFITS SHOULD BE RESTORED UNDER *URICOLI*

A. THE *URICOLI* FACTORS WERE NOT PROPERLY ANALYZED

B. THE *URICOLI* FACTORS WERE NOT PROPERLY WEIGHED

II. A REDUCTION IN BENEFITS CONSTITUTES A SECOND PUNISHMENT WHICH IS BARRED BY DOUBLE JEOPARDY PRINCIPLES

III. PENSION FORFEITURE IS INAPPROPRIATE, WHEN THE UNDER-

Appendix A

LYING CONDUCT WAS THE PRODUCT OF A COMPULSIVE SEXUAL DISORDER

IV. THERE SHOULD BE NO PENSION REDUCTION BECAUSE THE CONDUCT WAS NOT SUFFICIENTLY RELATED TO APPELLANT'S EMPLOYMENT

V. ASSUMING ARGUENDO THAT THERE SHOULD BE A PARTIAL FORFEITURE, THE EFFECTIVE DATE WAS IMPROPERLY FOUND.

We have carefully reviewed the record and, in light of applicable law, we conclude that contentions I, III, IV and V are without merit. *R.* 2:11-3(e)(1)(D) and (E). The Board considered and evaluated the standards and factors announced in *Uricoli v. Police & Fire. Retirem. Sys.*, 91 *N.J.* 62 (1982). The Board's application of the *Uricoli* factors "was neither arbitrary and capricious nor unsupported by substantial credible evidence in the record." *Corvelli v. Trustees, Police & Firemen's Retirement Sys.*, 130 *N.J.* 539, 541 (1992). In particular, the evidence supports the finding that appellant became acquainted with B.C. and his vulnerability through appellant's employment as school psychologist. Thus, appellant exploited his position of trust and confidence. The fact that appellant's behavior was "compulsive" under *N.J.S.A.* 2C:47-3, as determined by the Adult Diagnostic and Treatment Center, does not convert dishonorable service into honorable service, though it may be considered as a mitigating factor. *Cf. T.J.M. v. Police & Fire. Retirement Sys.*, 218 *N.J. Super.* 274, 281 (App. Div. 1987).

We also reject appellant's contention that the partlal forfeiture

of his pension allowance violated constitutional guarantees against double jeopardy. *U.S. Const.* amend V; *N.J. Const.*, art I, para. 11.[2] Those guarantees protect, in part, against multiple punishment for the same offense. *Ayars v. New Jersey Dept. of Corr.*, 251 *N.J. Super.* 223, 226 (App. Div. 1991). In *Helvering v. Mitchell*, 303 *U.S.* 391, 58 *S.Ct.* 630, 82 *L.Ed.* 917 (1938), appellant contended that the imposition of a penalty equal to fifty percent of a tax deficiency, allegedly caused by appellant's fraud, was barred under the doctrine of double jeopardy where appellant had been acquitted of the fraud charge in a criminal trial. The Court explained that "[u]nless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause . . . is not applicable." *Id.* at 398-99, 58 *S.Ct.* at ___, 82 *L.Ed.* at 921. The Court recognized that the legislature may impose civil and criminal sanctions for the same act "for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 399, 58 *S.Ct.* at , 82 *L.Ed.* at 922. The Court held that the fifty per cent penalty was a remedial civil sanction "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401, 58 *S.Ct.* at ___, 82 *L.Ed.* 923.

Appellant relies on *United States v. Halper*, 490 *U.S.* 435, 109 *S.Ct.* 1892, 104 *L.Ed.*2d 487 (1989), in which the Court held that when a statute imposing a fixed penalty subjects an offender to a sanction overwhelmingly disproportionate to the damage he has

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2. Appellant does not contend that the New Jersey Constitution provides more protection than the United States Constitution. *See State v. DeLuca*, 108 *N.J.* 98, 101-02, *cert. denied*, 484 *U.S.* 944, 108 *S.Ct.* 331, 98 *L.Ed.*2d 358 (1987) (New Jersey's double jeopardy protection is co-extensive with federal constitution).

caused, the double jeopardy protection is violated. In that case defendant had been convicted of sixty-five counts of medicare fraud totaling $585. The civil penalty statute, however, imposed a sanction of $2,000 per count for a total of $130,000. Because the total penalty was not related rationally to the goal of compensating the government for its loss, it qualified as punishment. *Id.* at 449, 109 *S.Ct.* at ___, 104 *L.Ed.*2d at 502. The Court remanded to the trial court for a determination of an appropriate civil penalty based on an accounting of the government's damages and costs.[3]

Halper is distinguishable from the present case. The proceeding before the Board was intended to and did fashion a proportionate remedy for appellant's dishonorable service. Thus, *Halper's* principle, that a disproportionate civil remedy will constitute punishment, is not applicable. *Cf. State v. Ciba-Geigy Corp.*, 258 *N.J. Super.* 51, 60 (App. Div. 1992) (to determine whether civil penalty of $1.45 million was punitive or remedial, case must be remanded for comparison of the amount with government's costs and damages).

Appellant, however, relies on the double jeopardy definition in *Halper*, in which the Court stated that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 *U.S.* at 448-49, 109 *S.Ct.* at 1901-02, 104

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3. Our Supreme Court anticipated *Halper* when it decided *In re Garay*, 89 *N.J.* 104 (1982) involving the imposition of a $116,000 civil penalty for medicaid fraud totaling $1,290.20. Although the Court ruled that double jeopardy guarantees were not applicable, it remanded for determination of a reasonable penalty commensurate with the State's costs. The remand was prompted by due process considerations.

*L.Ed.*2d at 502. The *Halper* Court embellished its theme with this observation:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. *Ibid.* The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads . . . . Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> [490 *U.S.* at 447-448, 109 *S.Ct.* at 1901, 104 *L.Ed.*2d at 501 (footnote and citations omitted)].

Appellant points to language in *Eyers v. Public Employees' Retirem. Sys.*, 91 *N.J.* 51 (1982), decided the same day as *Uricoli*, characterizing the forfeiture of pension rights as punishment:

> As we noted in *Uricoli*, the pension forfeiture policy is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual

> and deterrence, both as to the offending individual and other employees.
>
> [*Eyers, supra*, 91 *N.J.* at 56.]

See also Corvelli v. Trustees, Police & Fire. Retirem. Sys., supra, 130 *N.J.* at 551 ("pension forfeiture is an acceptable form of punishment under our laws"). Accordingly, appellant contends that since forfeiture is punishment, multiple punishment has been imposed for the same criminal act in violation of double jeopardy protection.

We disagree. Full or partial forfeiture of pension rights is based on the employee's violation of the implied condition that the employee render honorable service. *Uricoli, supra*, 91 *N.J.* at 66. Thus, in *Masse v. Public Employees' Retirem. Sys.*, 87 *N.J.* 252 (1981) and *Procaccino v. Public Employees' Retirement System*, 87 *N.J.* 265 (1981), the Court prevented total forfeiture because in each case the employee's crime was unrelated to his employment. *Cf. T.J.M. v. Police & Fire. Retire. Sys., Inc., supra*, 218 *N.J. Super.* at 279, holding that "only in the most compelling of circumstances should the *Uricoli* test compel a civil servant to forfeit his pension rights when he is convicted of a crime involving moral turpitude which is unrelated to his public employment." Forfeiture is imposed because of the employee's breach of the condition of honorable service and, therefore, forfeiture is a concomitant of the administration of a public pension system, consistent with a pension's status as deferred compensation for services rendered. *Uricoli, supra*, 91 *N.J.* at 72. The "punishment" referred to in *Eyers, Uricoli* and, most recently, in *Corvelli*, is not punishment in the criminal sense, but rather is a collateral consequence of the employee's breach of the condition of honorable service. The "punishment" is analogous to a judgment for damages arising out

of a breach of contract. *See also Ayars v. New Jersey Dept. of Corr., supra*, 251 *N.J. Super.* at 229 (forfeiture of employment upon conviction of a crime does not violate prohibition against double jeopardy); *State v. Darby*, 246 *N.J. Super.* 432, 445-46 (App. Div.) (civil penalties were not disproportionate to the State's costs and, therefore, prohibition against double jeopardy not violated), *certif. denied*, 126 *N.J.* 342 (1991). We conclude, therefore, that the partial forfeiture of LePrince's pension did not violate the guarantee against double jeopardy.

We remand, however, for reconsideration of the Board's decision regarding recovery of the overpayment. As previously indicated, the Board determined that as a result of the recalculated pension allowance, LePrince had received $46,287.96 in excess payments. The Board determined that it would recoup the overpayment through assignment by LePrince to the Teachers' Pension and Annuity Fund of a death benefit in the amount of $11,720.68 and LePrince's pension contributions in the amount of $5,731.22 made after December 31, 1981 to the date of his retirement. LePrince agreed to make those assignments.

The Board also reduced LePrince's already reduced allowance by an additional $270 per month to recover the balance of the overpayment. Consequently, LePrince is receiving approximately $385 per month instead of the original monthly allowance of $1,465.08.

We now remand to the Board for reconsideration of the additional $270 reduction in LePrince's monthly allowance to recover the balance of the overpayment. We remand only because the record does not indicate that the issue received adequate consideration under the *Uricoli* test in light of some evidence that the reduction of LePrince's monthly allowance to $385 is causing

severe financial hardship. *Cf. Covelli, supra*, 130 *N.J.* at 549 "circumstances of employee's beneficiaries, their age, their means, and their reliance and dependency on continued receipt of payments [are] relevant factors to be weighed in the forfeiture decision"); *Eyers, supra*, 91 *N.J.* at 56-58 (in light of flexible nature of forfeiture remedy, deceased employee's widow is entitled to pension benefits based on husband's service up to year during which he committed job-related offenses).

The Board's determination that appellant's service after December 31, 1981 was not creditable for retirement calculation purposes is affirmed. The matter is remanded for reconsideration by the Board of its decision to recoup an overpayment by further reducing LePrince's monthly allowance. We do not retain jurisdiction.

APPENDIX B — ORDER OF SUPREME COURT OF NEW JERSEY DENYING MOTION FOR RECONSIDERATION FILED NOVEMBER 4, 1993

SUPREME COURT OF NEW JERSEY
September Term 1993
M-375/376
36,673

CHARLES LePRINCE,

Petitioner-Movant,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION, et al.,

Respondents-Respondents.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file motion for reconsideration of the petition for certification (M-375) is granted; and it is further

ORDERED that the motion for reconsideration (M-376) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 1st day of November, 1993.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX C — ORDER OF SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED SEPTEMBER 10, 1993

SUPREME COURT OF NEW JERSEY
C-5 September Term 1993
36,673

CHARLES LEPRINCE,

Petitioner-Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS PENSION AND ANNUITY FUND,

Respondent-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3092-91 having been submitted to this Court, and the Court having considered the same,

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of September, 1993.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX D — ORDER OF SUPREME COURT OF NEW JERSEY GRANTING MOTION OF NEW JERSEY EDUCATION ASSOCIATION TO APPEAR AS *AMICUS CURIAE*. FILED SEPTEMBER 10, 1993

SUPREME COURT OF NEW JERSEY
M-5 September Term *1993*
36,673

CHARLES LEPRINCE,

Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS PENSION AND ANNUITY FUND,

Respondent.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion of the New Jersey Education Association for leave to appear *amicus curiae* is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of September, 1993.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — ORDER OF SUPREME COURT OF NEW JERSEY GRANTING MOTION OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY TO APPEAR AS *AMICUS CURIAE* FILED SEPTEMBER 10, 1993

SUPREME COURT OF NEW JERSEY
M-4 September Term 1993
36,673

CHARLES LEPRINCE,

Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS PENSION AND ANNUITY FUND,

Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion of the Association of Criminal Defense Lawyers for leave to appear *amicus curiae* is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of September, 1993.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Supreme Court, U.S.
FILED
JAN 28 1994
OFFICE OF THE CLERK

No. 93-1210

In the

Supreme Court of the United States

October Term, 1993

CHARLES LePRINCE,

Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the partial forfeiture of the monthly pension allowance of a former school psychologist after his conviction for aggravated sexual contact with one of the students under his care constitutes a second punishment within the meaning of the Double Jeopardy Clause.

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No. 93-1210

In the

Supreme Court of the United States

October Term, 1993

CHARLES LePRINCE,

Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF FACTS

For almost 23 years, the Clifton, New Jersey public school system employed petitioner as a school psychologist responsible for counseling students facing emotional and psychological problems. He retired on January 1, 1986, on a veteran's retirement and thereafter, collected a pension in the amount of $1,465.08 every month.

Two years after his retirement, on February 23, 1988, petitioner was indicted on seven counts charging him with aggravated criminal sexual contact, criminal sexual contact, official misconduct and sexual assault. These charges arose out of incidents involving students placed with him for counseling while he was still working as a school psychologist. Petitioner pled guilty to Count One of the

indictment on December 20, 1989 and consequently, was sentenced to three years probation plus continued therapy to address his diagnosed paraphiliac attraction to young adolescent males. The sentencing court also entered an order prohibiting petitioner from becoming involved with young people in any capacity. The charge to which petitioner pled guilty reads as follows:

> The Grand Jurors of the State of New Jersey for the County of Passaic under their oaths present that Charles Edward LePrince on or about a date which fell between January 1 and June 30, 1982 in the City of Clifton in the County of Passaic and within the jurisdiction of this Court, did commit an act of sexual contact with [B.C.], and when [B.C.] was at least 13 but less than 16 years old and Charles LePrince had supervisory power over [B.C.] by virtue of professional or occupational status, for the purpose of sexually arousing or sexually gratifying the said Charles Edward LePrince, contrary to the provisions of *N.J.S.* 2C:14-3a and under circumstances set forth in *N.J.S.* 2C:14-2a(2)(b) and against the peace of this State, the government and dignity of same.

The Board of Trustees, Teachers' Pension and Annuity Fund (the "Board") reviewed the facts surrounding petitioner's conviction to determine his continued pension eligibility. In accordance with New Jersey's relevant pension statute *N.J.S.A.* 18A:66-1, *et seq.*, and the balancing test established by the New Jersey Supreme Court in *Uricoli v. Police & Fire. Retirem. Sys.*, 91 *N.J.* 62, 449 *A.*2d. 1267 (1982), the Board found that because of his conviction, petitioner's service as of January 1, 1982 was not creditable service and therefore, he could no longer receive pension benefits for any period thereafter. As a

result, he was entitled to receive benefits for only 18 years and nine months of service instead of 22 years and nine months of service. This reduced his monthly pension allowance from $1,465.08 to $655.02 as of September 1, 1990.

Additionally, because petitioner had been receiving $1,465.08 in monthly pension benefits for over four years and because petitioner's term of creditable service was subsequently reduced, the Board found that he had received more than he should have for that four year-period and ordered the recoupment of the overpaid amount. Consequently, his monthly pension allowance was reduced further to $385.00, until the $46,287.96 overpayment was fully recouped.

The Board's decision to forfeit part of petitioner's pension was upheld after a hearing before the New Jersey Office of Administrative Law. The Appellate Division of the Superior Court of New Jersey also upheld the Board's decision, finding that the partial pension forfeiture was appropriate in this case. *LePrince v. Teachers' Pension Fund*, 267 *N.J. Super.* 270, 631 *A.*2d 545 (App.Div.1993). Additionally, the Appellate Division concluded that the Double Jeopardy Clause had not been violated because the partial forfeiture constituted a "proportionate remedy for appellant's dishonorable service." *Id.* at 275. However, the court remanded the matter for reconsideration of the issue of recoupment of the overpayment "only because the record does not indicate that the issue received adequate consideration under the *Uricoli* test in light of some evidence that the reduction of LePrince's monthly allowance to $385 is causing severe financial hardship." *LePrince*, 267 *N.J. Super.* at 277-78.

Thereafter, petitioner filed a Petition for Certification which was denied by the New Jersey Supreme Court. His subsequent his Motion for Reconsideration was also denied.

SUMMARY OF ARGUMENT

The partial forfeiture of petitioner's pension after his conviction for aggravated criminal sexual contact with a student placed in his care as a school psychologist constituted a reasonable sanction for his failure to fulfill the obligation to provide honorable public service. The pension board properly weighed all of the equitable factors in determining that petitioner should forfeit only a portion of his pension. The partial forfeiture did not violate his guarantee against double jeopardy since the sanction was a proportionate remedy for his dishonorable service and was not intended to punish him, but was imposed to ensure that public pension funds were not granted for dishonorable service.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE FORFEITURE OF A PORTION OF THE PENSION OF A FORMER SCHOOL PSYCHOLOGIST AFTER HIS CONVICTION FOR SEXUALLY ABUSING A STUDENT IS NOT PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

In New Jersey, public employees seeking pension benefits must satisfy the implied condition of honorable public service. *See Corvelli v. Board of Trustees*, 130 *N.J.* 539, 550, 617 *A.*2d 1189, 1195 (1992); *Uricoli v. Police & Fire. Retirem. Sys.*, 91 *N.J.* 62, 66, 449 *A.*2d. 1269 (1982); *Masse v. Public Employment Retirem. Sys.*, 87 *N.J.* 252, 256, 432 *A.*2d 1339, 1341 (1981); *Makwinski v. State*, 76 *N.J.* 87, 90, 385 *A.*2d 1227, 1229 (1978). In certain circumstances where the employee has committed some misconduct during the term of employment, it has been determined that pension forfeiture is an appropriate sanction for dishonorable public service. *See Corvelli*, 130 *N.J.* 539, 617 *A.*2d 1189; *Uricoli*, 91 *N.J.* 62, 449 *A.*2d. 1269. Whether an employee's misconduct will lead to pension forfeiture depends on the facts of each case. "[T]he proper approach to the resolution of the problem of what constitutes dishonorable service justifying the forfeiture of earned pension benefits is one which calls for flexibility and the application of equitable considerations." *Uricoli*, 91 *N.J.* at 77, 449 *A.*2d at 1275. This equitable approach reflects the New Jersey Supreme Court's rejection of automatic total pension forfeiture, even in cases where the employee's misconduct is related to the employment. *Id.*

Thus, in New Jersey, a person's pension may not be forfeited, in part or in whole, without first applying an eleven-factor balancing test to the circumstances of his or her case. The forfeiture analysis must include the consideration of

> (1) the employee's length of service;
>
> (2) the basis for retirement, *i.e.*, age, service, disability, etc.;
>
> (3) the extent to which the employee's pension has vested;
>
> (4) the duties of the particular employment;
>
> (5) the employee's public employment history and record;
>
> (6) the employee's other public employment and service;
>
> (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;
>
> (8) the relationship between the misconduct and the employee's public duties;
>
> (9) the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like;

> (10) the availability and adequacy of other penal sanctions; and
>
> (11) other personal circumstances relating to the employee bearing upon the justness of forfeiture.

Uricoli, 91 *N.J.* at 78, 449 *A.*2d. 1275-6. New Jersey's Supreme Court, thus, has established a test that "accommodates equitable considerations." *Corvelli*, 130 *N.J.* at 552, 617 *A.*2d at 1195.

The circumstances of this case led the pension board, the Administrative Law Judge and the Appellate Division to conclude that partial forfeiture of petitioner's pension was an appropriate sanction. Petitioner served as a school psychologist responsible for evaluating and counseling troubled public school students. He was convicted of sexually abusing one of the students over whom he exerted his supervisory power. Although the conviction occurred after his retirement, petitioner committed the offense in 1982, while he was still working for the Clifton public school system. Given these facts, the pension board weighed all of the factors under the balancing test and determined that the circumstances warranted a forfeiture of only that part of his pension benefits accruing after the date of his criminal misconduct.

Petitioner insists, however, that the partial forfeiture of his pension violated the Double Jeopardy Clause. In *U.S. v. Halper*, 490 *U.S.* 435 (1989), this Court addressed the question of "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." 490 *U.S.* at 446. In discussing this issue, the Court cautioned that the question could not be answered from the defendant's point of view because "even remedial sanctions carry the sting of punishment" for the

defendant. 490 *U.S.* at 447, n.7. Instead, an analysis must be made as to the character of the sanction and the purposes that it may serve. Thus, "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-449. In a recent case involving the Eighth Amendment's Excessive Fines Clause, *Austin v. U.S.*, __ *U.S.* __, 113 *S.Ct.* 2801 (1993), this Court stated that the determination as to whether *in rem* civil forfeiture statutes constituted punishment depended on whether the forfeiture sanction "can only be explained as serving in part to punish." *Id.* at 2806. Relying primarily on *Halper* and *Austin*, petitioner in this case argues that the forfeiture of part of his pension constitutes a punishment in violation of the Double Jeopardy Clause.

The goal of pension forfeiture is not to punish in the "relevant sense" under the Double Jeopardy Clause. *See Halper*, 490 *U.S.* at 448. The forfeiture of pension benefits serves the purpose of ensuring that public pension monies are granted only to public employees who have provided honorable service. Where an employee has failed to provide honorable, creditable State service, the employee is not entitled to reap the benefits of the public pension fund. The New Jersey Supreme Court has reaffirmed that "[a]ll public pension statutes in this State carry the implicit condition precedent of honorable service to an award of pension benefits, and forfeiture can be ordered for failure of that condition." *Corvelli*, 130 *N.J.* at 550, 617 *A.*2d at 1195. Although the sanction has been labeled punishment, *see Corvelli*, 130 *N.J.* at 552, 617 *A.*2d at 1195, pension forfeiture "is not punishment in the criminal sense, but rather is a collateral consequence of the employee's breach of the condition of honorable service." "The 'punishment' is analogous to a judgment for damages arising out of a breach of contract." *LePrince v. Teachers' Pension Fund*,

267 *N.J. Super.* 270, 277, 631 *A.*2d 545, 549 (App.Div. 1993).

The balancing test that must be performed in order to forfeit a person's pension in New Jersey reflects this Court's intention in *Halper* to prevent the imposition on criminal defendant's of disproportionate civil sanctions that rise to the level of prohibitive double punishment. In making the *Halper* analysis, the facts of each particular case must be carefully considered. This Court noted that "a civil as well as a criminal sanction constitutes punishment when the sanction as applied to the individual case serves the goals of punishment." *Halper*, 490 *U.S.* at 448 (emphasis added).

In petitioner's case, the forfeiture of only part of his pension was not to punish him for the conviction, but to ensure that public pension funds were not used to compensate an employee who had breached the requirement that he provide honorable service. Indeed, the pension board determined that petitioner would forfeit only those pension benefits representing service after the commission of his offense, that is after 1982, the date he committed the criminal action. The State would be remiss in its duty to properly administer the public pension system if it were required to pay petitioner for public service tainted by his sexual abuse of one of the students he was assigned to counsel.

As stated by the Appellate Division below, "[t]he proceeding before the [pension] Board was intended to and did fashion a proportionate remedy for appellant's dishonorable service." *LePrince*, 267 *N.J. Super.* at 275, 631 *A.*2d at 548. This Court acknowledged in *Halper* that the determination that a civil sanction violates the guarantee against double jeopardy will be made only in the rare case, where the sanction is "overwhelmingly disproportionate" to the damage caused by the offender. *Halper*, 490 *U.S.* at

449. The forfeiture of only a part of petitioner's pension cannot be deemed an overwhelmingly disproportionate sanction for the breach of his obligation to provide honorable public service. In this case, there has been no violation of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 93-1210

In The

Supreme Court of the United States

October Term, 1993

CHARLES LePRINCE,

Petitioner,

vs.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONER

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United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989) 2

RESPONSIVE STATEMENT OF FACTS

Petitioner Charles LePrince worked for more than twenty-two years as a psychologist in the Clifton, New Jersey public school system. A supervisor, reviewing his work near the end of his career, called him "an exemplary model for other school psychologists." Even during a period of failing health, after the event which caused his criminal conviction and partial pension forfeiture, an evaluation of the petitioner noted that "his productivity and leadership in the area of school psychology has remained outstanding."[1] Upon his retirement, the Board of Education in Clifton acknowledged his "exemplary service to [his] pupils and to this community."

During the petitioner's tenure with the Clifton schoo' system, he met the student who is the subject of the charge to which the petitioner pled guilty. A close relationship developed between the petitioner and the student's family outside the school context. That friendship continued throughout the proceedings in New Jersey ten years after the incident. The student's father submitted a letter to the Administrative Law Judge requesting that the petitioner's pension not be reduced.

While this support from the victim's father might seem unusual, it can probably be best understood if one is aware of the facts of the central incident. Sometime after developing a personal relationship with the family, the petitioner and the student were alone in the petitioner's car, after school hours, off school property, and at a time when the petitioner had no official duties with respect to the student. The petitioner placed his hand on the student's thigh and was asked to remove it. He did so and there was not further repetition of this conduct. However, the act constituted

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1. Petitioner's evaluations are contained in the record below.

the crime of aggravated criminal sexual contact under New Jersey law.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO CLARIFY THE MEANING OF PUNISHMENT WITHIN THE CONTEXT OF THE DOUBLE JEOPARDY CLAUSE.

Respondent argues that, "The goal of pension forfeiture is not to punish in the 'relevant sense' under the Double Jeopardy Clause." This argument is apparently designed to address Justice Blackmun's explanation in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989), that in order to determine whether a "civil sanction constitutes punishment in the relevant sense" requires an "assessment of the penalty imposed and the purposes served by the penalty." Justice Blackmun explained,

> A civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence.

490 U.S. at 448, 109 S. Ct. at 1901-1902 (citations omitted).

Furthermore, it was noted that "retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.*

In *Eyers v. Public Employees' Retirem. Sys.*, 91 N.J. 51, 56, 449 A.2d 1261, 1264 (1982), the assessment about which Justice Blackmun wrote was made. There, the Supreme Court of New Jersey explained that "pension forfeiture policy is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual and deterrence, both as to the offending individual and other employees." Thus it is clear that, under New Jersey law, pension forfeiture serves, at least "in part to punish" and that is the test for double jeopardy purposes. *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993).

Respondent relies upon the decision of the Appellate Division of the Superior Court of New Jersey in analogizing pension forfeiture to "a judgment for damages arising out of a breach of contract." *LePrince v. Teachers' Pension Fund*, 267 N.J. Super. 270, 277, 631 A.2d 545, 549 (App. Div. 1993). This analogy is incorrect. A pension is part of a compensation package agreed upon between the Board of Education and their employees. By the Board's own evaluation, the petitioner performed his services and did so in an exemplary fashion. Unlike a party to a breached contract, the Board of Education, and certainly the Teachers' Pension and Annuity Fund (T.P.A.F.) was not injured. The Board of Education received the services for which they paid the petitioner. Reducing the petitioner's pension is not designed in any way to "make the T.P.A.F. whole." Rather, as the Supreme Court of New Jersey has consistently held, reduction of a pension is meant to punish. Accordingly, that punishment, in addition to the punishment imposed in the criminal process, violates the prohibition of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, as well as those contained in the original petition, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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